

No. 91-200

Supreme Court, U.S.
F I L E D
AUG 30 1991
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

**ROBERT C. RICHARDS, EDWARD KAUFMAN
AND MARTIN ROCHMAN,**

Petitioners.

v.

THE STATE OF NEW HAMPSHIRE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW HAMPSHIRE

**BRIEF OF RESPONDENTS NORTHEAST UTILITIES
SERVICE COMPANY AND PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

Thomas D. Rath
Rath, Young, Pignatelli
and Oyer, P.A.
Two Capital Plaza
P.O. Box 854
Concord, NH 03302-0854

Allan B. Taylor
Counsel of Record
John B. Nolan
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
(203) 275-0100

*Attorneys for Respondents Northeast Utilities Service Company
and Public Service Company of New Hampshire*

QUESTION PRESENTED

Does a claim by shareholders in a public utility company that they should be granted standing in state court to challenge a state regulatory decision despite their company's support for that decision present a federal question suitable for review by this Court?

LIST OF PARTIES

Respondents supplement the statement set forth by petitioners by stating that respondent Northeast Utilities Service Company is a wholly owned subsidiary of Northeast Utilities, a public utility holding company. Northeast Utilities Service Company has no subsidiaries. The following subsidiaries of Northeast Utilities have issued shares or debt securities to the public:

The Connecticut Light and Power Company
Holyoke Water Power Company
Western Massachusetts Electric Company

Public Service Company of New Hampshire is a public utility company that has issued shares or debt securities to the public. It has no parent company and no subsidiaries that are not wholly owned.

Other entities with publicly-held securities in which Northeast Utilities and/or Public Service Company of New Hampshire have an interest that Rule 29.1 may require to be disclosed are:

Connecticut Yankee Atomic Power Company
Maine Yankee Atomic Power Company
Vermont Yankee Nuclear Power Corporation

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE.....	1
REASONS WHY THE WRIT SHOULD NOT BE GRANTED.....	4
Petitioners' Desire To Assert On Behalf Of PSNH And Its Shareholders A Claim That PSNH Has Chosen Not To Assert Presents No Federal Question For Review By This Court.....	4
CONCLUSION	6

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Burks v. Lasker</i> , 441 U.S. 471 (1979)	5,6
<i>City of Tacoma v. Taxpayers of Tacoma</i> , 357 U.S. 320 (1958)	5
<i>Daily Income Fund, Inc. v. Fox</i> , 464 U.S. 523 (1984)	4
<i>Kamen v. Kemper Financial Services, Inc.</i> , 111 S. Ct. 1711 (1991).....	5
 <u>Statutes</u>	
28 U.S.C. § 1257(a) (West Supp. 1991).....	5
28 U.S.C. § 158(a) (West Supp. 1991)	5
N.H. Rev. Stat. Ann. ch. 362-C (Supp. 1990).....	2,3

NO. 91-200

IN THE

Supreme Court of the United States

October Term, 1991

ROBERT C. RICHARDS, EDWARD KAUFMAN
AND MARTIN ROCHMAN,

Petitioners,

v.

THE STATE OF NEW HAMPSHIRE,

Respondent.

BRIEF OF RESPONDENTS NORTHEAST UTILITIES
SERVICE COMPANY AND PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Public Service Company of New Hampshire ("PSNH") is the largest electric utility company in the state of New Hampshire and provides service to approximately three quarters of that state's population. On January 28, 1988, after several years of increasing economic difficulties, PSNH sought the protection of the bankruptcy court by filing a petition for reorganization pursuant to Chapter 11 of the Bankruptcy Code.

The PSH filing triggered a period of intensive litigation and negotiation among PSH, the State of New Hampshire, holders of various interests in and claims against the bankruptcy estate, and a number of parties interested in acquiring PSH. In November of 1989, the State and respondent Northeast Utilities Service Company ("Northeast") agreed on a rate plan to help resolve the bankruptcy in connection with the proposed acquisition of PSH by Northeast. A reorganization plan embodying the proposed acquisition won the support of PSH and the official committees appointed by the bankruptcy court to represent the equity owners and the impaired major creditors of PSH.¹

Following appropriate hearings, the bankruptcy court confirmed the reorganization plan proposed by Northeast. Petitioners Richards, Kaufman, and Rochman ("RKR"), owners of less than one percent of the common stock in PSH, participated actively in the confirmation hearings as opponents of the plan. Indeed, as the bankruptcy court noted in its extensive memorandum opinion overruling RKR's objections, Pet. App. 536a-647a, most of the time spent in the confirmation hearings focused on RKR's claims. *Id.* at 539a. RKR appealed the bankruptcy court's confirmation order to the United States District Court for the District of New Hampshire, which affirmed the decision of the bankruptcy court on August 22, 1991.

The Northeast reorganization proposal included as an essential element the agreement with the State which specifies a range within which rates for retail sales of electricity by PSH will be set for a seven-year period. In order to facilitate implementation of this agreement, the New Hampshire legislature enacted Chapter 362-C of the New Hampshire Revised Statutes Annotated, the statute petitioners seek to challenge in this Court. Proceeding

¹The Northeast plan was ultimately approved by a two-thirds vote of each of the impaired classes except warrant owners, the owners of the most junior interest in PSH.

pursuant to Chapter 362-C, the New Hampshire Public Utilities Commission devoted twenty-one days of hearing to consideration of the rate agreement. Pet. App. 110a. Northeast and PSNH both urged the New Hampshire Commission to approve the agreement, *id.* 127a, which it did in a Report and Order dated July 20, 1990. *Id.* 73a-447a.

RKR, whose late-filed petition to intervene in the rate agreement proceedings had been denied, Pet. 46, appealed the order approving the rate agreement to the New Hampshire Supreme Court. On appeal, RKR contended that PSNH would have received a greater level of rate relief, and PSNH shareholders would therefore have benefited, if PSNH had sought to litigate its entitlement to higher rates under traditional procedures rather than seeking approval of the rate agreement under Chapter 362-C. Based on that contention, RKR claimed that the Commission's approval of the agreement constituted an unconstitutional taking of the property of PSNH and its shareholders. According to RKR, the fact that PSNH asked the Commission to approve the rate agreement simply demonstrated that RKR should be allowed to assert PSNH's constitutional claim.

The New Hampshire Supreme Court held that the claim asserted by RKR belonged to PSNH, and that RKR did not have standing to assert it. Pet. App. 14a-17a. The New Hampshire Supreme Court also held that RKR could not transform their administrative appeal into a derivative action in which RKR would be allowed to litigate on behalf of PSNH a claim that PSNH's directors had decided not to assert. *Id.* at 15a. Petitioners ask this Court to reverse these state law holdings and to reach their claim that the rate agreement supported by PSNH violates federal constitutional rights of PSNH and, therefore, its shareholders.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Petitioners' Desire To Assert On Behalf Of PSNH And Its Shareholders A Claim That PSNH Has Chosen Not To Assert Presents No Federal Question For Review By This Court

The New Hampshire Supreme Court has determined that petitioner minority shareholders in a New Hampshire corporation have no right to assert on behalf of their corporation a claim that their corporation has chosen not to assert. This holding presents no federal question for review by this Court because, as this Court has repeatedly held, the allocation of the powers of corporate governance, including the right to determine the litigating positions of a corporation, is purely a matter of state law.

As this Court has explained,

"[w]hether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders." *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 263 (1917).

Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 532 (1984). This understanding reflects the

basic principle of corporate governance that the decisions of a corporation – including the decision to initiate litigation – should be made by the board of directors or the majority of shareholders.

Id. at 530. Specification of the circumstances under which this "basic principle of corporate governance" will be set aside "embodies the incorporating State's allocation of governing powers within the corporation...." *Kamen v. Kemper Financial Services, Inc.*, 111 S. Ct. 1711, 1714 (1991).

State law determines the "allocation of governing powers within the corporation."

As we have said in the past, the first place one must look to determine the powers of corporate directors is in the relevant State's corporation law.... "Corporations are creatures of state law," ... and it is state law which is the font of corporate directors' powers.

Burks v. Lasker, 441 U.S. 471, 478 (1979). Thus, the New Hampshire Supreme Court's determination that petitioner minority shareholders do not have the right to control the litigating position of PSNH in opposition to the judgment of the directors of PSNH² is entirely a decision on a question of state law.³ The New Hampshire Supreme Court's determination of this question of New Hampshire law is binding on this Court, and is not subject to review pursuant to 28 U.S.C. § 1257(a) (West Supp. 1991). Moreover, even if petitioners' claim were within the outer reaches of § 1257(a), this Court does "'not grant certiorari to decide [a question of state law],'

²RKR also seek to override the judgment of the greater than two-thirds majority of voting shareholders who chose to support the reorganization plan and rate agreement. *See Pet.* 30.

³This conclusion is not changed by the fact that RKR seek to press what they assert to be a federal claim on behalf of PSNH. *See Burks v. Lasker, supra.* Moreover, to the extent that petitioners sought in the New Hampshire Supreme Court and seek here to challenge the actions of the Bankruptcy Court, *see Pet.* 20-45, they are in the wrong forum. *See* 28 U.S.C. § 158(a) (West Supp. 1991); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-37 (1958).

Butner v. United States, 440 U.S. 48, 51 (1979)...” *Burks v. Lasker, supra*, 441 U.S. at 486.

CONCLUSION

For the reasons stated above, respondents Northeast Utilities Service Company and Public Service Company of New Hampshire request that the petition for a writ of certiorari to the Supreme Court of New Hampshire be denied.

Respectfully submitted,

Respondents, NORTHEAST
UTILITIES SERVICE COMPANY
and PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE

By: Allan B. Taylor
Counsel of record
John B. Nolan
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
(203) 275-0100

Thomas D. Rath
Rath, Young, Pignatelli
and Oyer, P.A.
Two Capital Plaza
P.O. Box 854
Concord, NH 03302-0854